**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **EDITH L. CHRISTY** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 168,575 |
| **U.S.D. NO. 365** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **TRINITY UNIVERSAL INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appeals from an Award rendered by Special Administrative Law Judge William F. Morrissey on June 6, 1995. The Appeals Board heard oral argument on October 4, 1995.

### APPEARANCES

Claimant appeared by and through her attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Matthew S. Crowley of Topeka, Kansas.

### RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board adopts the stipulations listed in the Award.

### ISSUES

On appeal claimant asks for review of the findings and conclusions regarding:

(1) Nature and extent of claimant's disability, including work disability; and

(2) Whether she is entitled to reimbursement for the purchase of a hot tub as authorized medical expense.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

(1) Claimant is entitled to a work disability and benefits should be based upon a fifty percent (50%) permanent partial general disability.

Respondent argues that the claimant's award should be limited to functional impairment only, based upon the holding in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). In the Foulk decision, the Kansas Court of Appeals ruled that the presumption of no work disability should apply when a claimant rejects offered employment at comparable wage which the claimant has the ability to perform. In this case, claimant made no attempt to return to work after she was released from treatment. On January 31, 1994 respondent offered claimant an accommodated position of assistant secretary consisting of twenty (20) hours per week at $5.85 per hour, together with a separate position as a crossing guard for two (2) hours per day. Taken together these two (2) positions would have paid claimant a comparable wage. Furthermore, the Appeals Board finds that these positions with the accommodations respondent was willing to make were within the claimant's restrictions.

Claimant testified that she did not attempt the accommodated jobs offered by respondent because she was not qualified for the secretarial position and because the school was located ten (10) miles from her home. She did not think that she was physically capable of driving that distance. The correspondence between respondent and claimant's counsel makes it clear that the typing and ten (10) key adding machine skills needed for the assistant secretary position would be minimal to nonexistent. Furthermore, they were willing to accommodate claimant to the extent necessary for her to perform these jobs. Dr. Edward Prostic, the only physician offering testimony in this case, gave an opinion that if claimant was in a well-maintained car driving over well-maintained roads, he would expect her to be able to drive ten (10) miles. In fact, he would expect her to be able to drive for thirty to sixty (30-60) minutes at a time in a well-maintained car over smooth roads. Furthermore, Dr. Prostic opined that if claimant could sit frequently, she should be able to do the school guard crosswalk job. She would not, however, be able to stand and walk for two (2) hours at a time. The school crossing job consisted of two separate one (1) hour duties, basically right before and right after school. In addition, claimant was to be provided a folding chair so that she could sit intermittently.

The Court of Appeals in the Foulk decision considered the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e(a) to apply where a worker unreasonably refuses to engage in work at a comparable wage where the proffered job is within the worker's ability. In so holding, the Court of Appeals found that the legislature did not intend for a worker to receive work disability where the worker was still capable of earning nearly the same wage. In this case, although the accommodated job offered by the respondent would pay claimant a wage comparable to the average weekly wage she was earning as a part-time employee of the respondent prior to her injury, this does not mean that the claimant is capable of earning a comparable wage in the open labor market. Prior to her accident, claimant had no medical restrictions and was capable of working a forty (40) hour work week even though she chose to work only part time. Dr. Prostic testified that she is

now limited to part-time, sedentary employment. The record also contains the testimony of vocational expert Michael Dreiling. He applied the medical restrictions of Dr. Prostic to his understanding of the claimant's education, training and work experience to conclude that claimant was essentially unemployable in the competitive labor market. He believes her vocational loss to be one hundred percent (100%). The Appeals Board finds that the presumption of no work disability contained in K.S.A. 1990 Supp. 44-510e(a) has been overcome in this case. Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993).

Claimant argues that the opinion of the Kansas Court of Appeals in Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993) presents facts similar to those in this case and that claimant, being essentially unemployable, is entitled to an award based upon a permanent total disability. However, in Wardlow the employer did not offer claimant an accommodated job at a comparable wage. It is a fundamental goal of the Kansas Workers Compensation Act to return an injured worker to gainful employment whenever possible. See K.S.A. 1990 Supp. 44-510g. Furthermore, employers are encouraged to accommodate injured and handicapped employees so as to accomplish this purpose. Recognition should be given to the employer's offer of a comparable wage job and the claimant's refusal to attempt that position. Accordingly, the Appeals Board will impute the comparable wage which the claimant would have earned had she accepted the respondent's offer of an accommodated position to find that she has no wage loss for purposes of that prong of the two-part work disability test contained in K.S.A. 1990 Supp. 44-510e(a) which pertains to the extent to which her ability to earn comparable wages has been reduced. In regard to the second prong of the work disability determination, the Appeals Board adopts the opinion of Mr. Dreiling in finding claimant has lost one hundred percent (100%) of her ability to perform work in the open labor market. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). Although not required to do so, the Appeals Board finds no compelling reason not to give both prongs of this two-part test equal weight and by averaging claimant's one hundred percent (100%) labor market loss with her zero percent (0%) wage loss, finds that claimant has proven a fifty percent (50%) work disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

(2) The Appeals Board finds that claimant has not met her burden of proof that the hot tub constitutes a reasonable and necessary medical expense for which she should receive reimbursement from the respondent. The only evidence to support the claim is a prescription slip from a physician who did not testify in this case and the claimant's testimony that the hot tub helps her relax. Although the hot tub may be a reasonable and necessary expense with a recognized therapeutic value, we find the record to be insufficient to carry claimant's burden in this regard. Therefore, the findings and conclusions made by the Special Administrative Law Judge in denying the hot tub as an authorized medical expense are approved and adopted by the Appeals Board for this review.

All other findings and conclusions made by the Special Administrative Law Judge which are not inconsistent with the findings and conclusions of the Appeals Board herein, are hereby adopted by the Appeals Board as its own.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated June 6, 1995, should be, and hereby is, modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Edith L. Christy, and against the respondent, USD No. 365, and its insurance carrier, Trinity Universal Insurance Company, for an accidental injury which occurred May 24, 1991 and based upon an average weekly wage of $156.09, for 130.86 weeks of temporary total disability compensation at the rate of $104.07 per week or $13,618.60, followed by 284.14 weeks at the rate of $52.04 per week or $14,786.65 for a 50% permanent partial general body work disability, making a total award of $28,405.25.

As of October 13, 1995, there is due and owing claimant 130.86 weeks of temporary total disability compensation at the rate of $104.07 per week or $13,618.60, followed by 98.14 weeks of permanent partial disability compensation at the rate of $52.04 per week in the sum of $5,107.21, for a total of $18,725.81 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $9,679.44 is to be paid for 186 weeks at the rate of $52.04 per week, until fully paid or further order of the Director.

The Appeals Board otherwise approves and adopts the remaining orders entered by the Special Administrative Law Judge as set forth in his June 6, 1995 Award.

**IT IS SO ORDERED.**

Dated this ____ day of October 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Matthew S. Crowley, Topeka, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director